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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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3/4/98

In the Matter of )  
Federal-State Joint Board on )  
Universal Service )  
)

CC Docket No. 96-45  
AAD/USB File No. 98-37

COMMENTS OF THE NATIONAL TELEPHONE COOPERATIVE ASSOCIATION  
ON THE PETITION FOR WAIVER OF  
THE IOWA TELECOMMUNICATION AND TECHNOLOGY COMMISSION

National Telephone Cooperative Association

March 4, 1998

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## TABLE OF CONTENTS

	Page
SUMMARY .....	ii
I. BACKGROUND AND PROCEDURAL MATTERS .....	2
A. Background .....	2
B. The Determination Request appears to be a Petition for Reconsideration .....	3
II. ICN IS NOT A TELECOMMUNICATIONS CARRIER BECAUSE IT SERVES ONLY USERS AUTHORIZED BY THE STATE .....	5
A. ICN's Authorized Users .....	5
B. ICN does not meet the definition of common carrier .....	5
III. DESIGNATION OF ICN AS A COMMON CARRIER ELIGIBLE FOR DIRECT SUPPORT WOULD REDUCE COMPETITION FOR THE PROVISION OF SERVICE TO SCHOOLS AND LIBRARIES .....	9
IV. CONCLUSION .....	10

## SUMMARY

The request of the Iowa Telecommunications and Technology Commission (ITTC) that the Iowa Communications Network (ICN) be classified by the Commission as a common carrier appears to be, in effect, a petition for reconsideration. As such, ITTC has not shown any material facts which the Commission did not have before it when it determined that ICN is not properly classified as a common carrier. Even if the request can be considered a waiver, ITTC has not shown where the Commission has the authority to waive a statutory requirement.

If the Commission nevertheless considers the request on the merits, it will find that its previous conclusion was correct, ICN does not meet the definition of a common carrier. ICN is explicitly restricted by state law to serving only a list of authorized users, and so does not meet the requirement that it offer its service to the public. ITTC, claims that the list of authorized users is sufficiently broad and numerous that it meets the alternative standard to be available "to such classes of users as to be effectively available to the public." The Commission considered questions of whether restrictions on users were inconsistent with availability to the public in applying the similarly worded statute requiring classification of mobile services. There it found several classes of service to be too restricted, although they were broad and more numerous than ICN's users. The case law recognizing that a carrier need not serve all the public, essentially considers suitability of the service, or limitation on capacity, but ICN's service are quite generic and suitable for users barred by the state law.

Finally, designation of the state operated and supported network as eligible for direct universal service support would reduce competition for the provision of service to schools and libraries. The Commission's rules require a competitive bidding process, yet any carrier bidding

against ICN will not be in a competitively neutral environment given the strong desire of the legislature that all state agencies use the network.

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The National Telephone Cooperative Association (NTCA) hereby files its comments in response to the Commission's Public Notice of February 13, 1998, DA 98-294. Comments were requested regarding a letter of February 4, 1998, on behalf of the Iowa Telecommunications and Technology Commission (ITTC) seeking a determination that the Iowa Communications Network (ICN), which it operates, is eligible to receive universal service payments as a provider of telecommunications services to schools, libraries and rural health care institutions.<sup>1</sup> NTCA is a national association of 500 local exchange carriers. Many of NTCA's members operate in Iowa, however members in other states are interested in this proceeding because of its implications in their states.

The Western Rural Telephone Association supports NTCA's position in this filing. It is composed of 150 local exchange carriers that operate in the western United States.

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<sup>1</sup>Letter from J.G. Harrington to Magalie Roman Salas, February 4, 1998, Eligibility for Universal Service Payments. ("Determination Request")

## I. BACKGROUND AND PROCEDURAL MATTERS

### A. Background

Section 254(h) of the Communications Act provides that telecommunications carriers shall provide telecommunications services at discounts to schools, libraries and rural health care providers. The discounts are funded by the universal service support mechanism established in Section 254(a). In its orders adopting implementing rules, the Commission determined that service providers will be eligible to receive compensation for discounts if they operate as common carriers.<sup>2</sup> The *Fourth Reconsideration Order* addressed at length the issue of the qualification of several state networks, including specifically ICN, for direct reimbursement from the support mechanisms for services provided at a discount to eligible schools and libraries. ICN had argued on reconsideration that it was a telecommunications carrier eligible for direct reimbursement.<sup>3</sup> ICN also argued, however, that it should not be required to contribute to the universal service support mechanism. The Commission concluded that the state networks were consortia eligible to obtain discounts *on behalf of eligible schools and libraries* (emphasis added).<sup>4</sup> However, except for Internet access and inside connections, none of the state networks would be eligible for direct reimbursement because they do not meet the definition of telecommunications carrier. Specifically, the state networks were found not to

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<sup>2</sup> Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776 (1997) ("Universal Service Order"); *Fourth Order on Reconsideration*, FCC 97-240, Dec. 30, 1997 ("Fourth Order on Reconsideration").

<sup>3</sup> *Fourth Order on Reconsideration* at para. 177

<sup>4</sup> *Id.*, para. 182.

offer telecommunications "for a fee directly to the public or to such classes of users as to be directly available to the public."<sup>5</sup>

Following the release of the *Universal Service Order* in which the Commission set forth at length its views on the meaning of the term "directly to the public,"<sup>6</sup> ITTC made an extensive ex parte presentation and subsequently filed for reconsideration.<sup>7</sup> In the Determination Request ITTC asks the Commission to determine that, contrary to the finding in the *Fourth Order on Reconsideration*, ICN is eligible for direct reimbursement.<sup>8</sup>

B. The Determination Request appears to be a Petition for Reconsideration

The Commission's Public Notice has styled the Determination Request a "Petition for Waiver" although it was not so styled by ITTC. However styled, the procedural issue which the Commission must first address is whether it has before it a waiver petition, a declaratory ruling request or a petition for reconsideration, since different standards and filing times apply. A central question is whether the Determination Request presents any new facts or arguments, and if so, whether the facts relate to occurrences since the last opportunity to present or which could not have been learned through the exercise of ordinary diligence.<sup>9</sup> The factual assertions in the Determination letter appear to present nothing new from the previous extensive descriptions of

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<sup>5</sup> *Id.*, para. 187.

<sup>6</sup> *Universal Service Order*, 12 FCC Rcd 9177-78.

<sup>7</sup> See, generally, letter from J.G. Harrington to William F. Caton, June 23, 1997, Notice of Ex Parte Communication, CC Docket 96-45. ITTC Pet. for Recon., July 17, 1997.

<sup>8</sup> The request includes eligibility for reimbursement for discounts to rural health care institutions. The Commission has found, however, that only carriers designated "eligible" under Section 214(e) can receive support payments for service to rural health care providers. *Universal Service Order*, 12 FCC Rcd 9106. The request does not assert that ICN has been designated, or is qualified to be, an "eligible carrier."

<sup>9</sup> 47 C.F.R. 1.429(b).

ICN's operations,<sup>10</sup> except that ICN now recognizes that if it wants to be a common carrier for purposes of receiving direct universal service support, it must also be a common carrier for purposes of determining contribution requirements.<sup>11</sup> If the facts relevant to whether ICN offers its service to the public are not new,<sup>12</sup> it would appear to be precluded from seeking reconsideration. Yet, the Determination Request appears to essentially argue that the Commission has simply misunderstood the facts. Similarly, a declaratory ruling would not appear to be an appropriate request if the Commission has already determined the application of the law to the particular facts. On the other hand, if the request is for a waiver, it must request the Commission to waive some requirement within the Commission's discretion. The holdings of the two orders that only telecommunications carriers are eligible are based on the statute which the Commission is not free to waive.<sup>13</sup>

If the Commission proceeds with substantive analysis of the Determination Request, it should specify carefully its procedural basis for such consideration.

## II. ICN IS NOT A TELECOMMUNICATIONS CARRIER BECAUSE IT SERVES ONLY USERS AUTHORIZED BY THE STATE

### A. ICN's Authorized Users

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<sup>10</sup> See ns.1 and 7, *supra*.

<sup>11</sup> Determination Request at 4.

<sup>12</sup> ITTC's June 23, 1997 ex parte described its ownership, management, and service offerings, identified the authorized users, provided rate and financial information. Further information is available on its web site: <http://www.icn.state.ia.us>.

<sup>13</sup> Fourth Order on Reconsideration, para. 187.



ICN is an agency of the state of Iowa, and as such, has only the powers specifically given to it by the laws of Iowa. The Iowa Code, Chapter 8D. 11(2) states that communications service may not be provided or resold to entities other than public and private agencies. Public agencies include state agencies, schools, judicial department, an agency of the federal government or the United States post office. Private agencies are defined as accredited nonpublic schools, nonprofit institutions of higher education, certain hospitals and physician clinics.<sup>14</sup>

B. ICN does not meet the definition of common carrier

ITTC asserts it offers services on standard terms and conditions to all of its potential customers, such as educational institutions or health care providers, and serves a large number of customers. Therefore, it believes that it is a common, not private carrier even though the classes of customers which it may serve are prescribed by law.<sup>15</sup> ITTC cites holdings that a common carrier is not required to serve the whole public, that its services may be sufficiently specialized as to be of use only to a fraction of the population. These cases involve issues for the most part as to whether providing services that were only suitable for certain classes of customers could be considered common carriage.<sup>16</sup> ICN's services, however, are suitable for many types of users that may not avail themselves of its services because they are not designated as authorized under Iowa law.

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<sup>14</sup> Iowa Code, Chapter 8D.2(4) and (5). The administrative regulations of the ITTC exclude from the definition of authorized user those public or private agencies which did not certify to it by July 1, 1994, pursuant to Iowa Code Chapter 8D.9(1) that they intended to become part of the network, except for those which receive subsequent authority from the legislature.

<sup>15</sup> ITTC states that distance learning service is available to all educational institutions in the state, public or private and that the telemedicine services are available "wherever there is a doctor." The Iowa Code, however, authorizes services only to accredited nonpublic schools, nonprofit higher education institutions, hospitals licensed under Chapter 135B and physician clinics. It is thus at least possible that there may be schools or health care facilities excluded from the service.

The precise question raised by ITTC is whether an entity may be a common carrier if it chooses its customers by *status* rather than suitability of its service for a particular customer or exhaustion of facilities.<sup>17</sup> The services provided by ICN include voice, video, data and Internet services, which are well known to be suitable for use by entities other than ICN's authorized users, including a broad range of business, non-profit and residential users. The only real difference between many potential customers of ICN's service and the authorized users is that the legislature put the later on the approved list.

The 1996 Act defines Telecommunications Service as that offered to the public or "to such classes of users as to be effectively available directly to the public. . . ." ICN's service is admittedly not available to the public, but only to its authorized users. ICN argues however, that the classes of authorized users are so broad, and the members of the class so numerous, that it meets the test of being "effectively available directly to the public." Similarly, Section 332(d)(1) defines commercial mobile service as that which makes interconnected service available to the public or "to such classes of eligible users as to be effectively available to a substantial portion of the public."<sup>18</sup> However, in adopting rules to determine which mobile services should be considered to be within the "effectively available" definition, the Commission determined that services offered to "significantly restricted" classes did not qualify. Among the services with such restrictions were: public safety, special emergency, industrial (except business), land

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<sup>16</sup> *Nat. Ass'n of Regulatory Utility Comm'rs v. F.C.C.*, 525 F.2d 630 (D.C. Cir. 1976).

<sup>17</sup> ITTC states that its services are offered at standard terms and rates, and that it serves hundreds of users. Determination Request at 3-4.

<sup>18</sup> 47 U.S.C. 332(d)(1). This section was added to the Communications Act in 1993.

transportation, radiolocation, maritime and aviation services.<sup>19</sup> Services which were found to be offered "effectively to a substantial portion of the public" include the Business Radio, PCPs,<sup>20</sup> commercial 220-22 MHz land mobile and SMRs. The Commission noted, for example, that Business Radio eligibility include "any person engaged in the operation of commercial activities, educational, philanthropic, or ecclesiastical institutions, clergy activities, and hospitals, clinics or medical associations."<sup>21</sup>

In the CMRS decision, the Commission thus set out specific examples of how government imposed limitations on the classes of customer a carrier may serve determine whether or not the carrier is a common carrier. The restrictions imposed on ICN by its organic law are comparable to the restrictions imposed on the wireless carriers which the Commission found did not meet the requirement for CMRS because eligibility to use the service was "significantly restricted." The Commission's interpretation of Section 332 thus reinforces the conclusion that the restrictions on authority to use ICN's services mean that it can not be found to meet the "effectively available to the public" standard.<sup>22</sup>

The issue is not that addressed in ITTCs quotation from NARUC I regarding a service

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<sup>19</sup> Implementation of Sections 3(n) and 332 of the Communications Act, *Second Report and Order*, 9 FCC Rcd 1411, 1440 (1994). Note that most if not all of these services have a large number of users. For example, Public Safety includes governmental agencies, medical services, rescue organizations, veterinarians, persons with disabilities, disaster relief organizations, school buses, search patrols, establishments in isolated places, communications standby facilities, and emergency repair of public communications facilities. The specific eligibilities are set forth at 47 C.F.R. § 20.20.

<sup>20</sup> The Commission referred to comments noting that Private Carrier Paging is effectively available to the public without restriction because it is allowed to serve individuals as well as P. eligibles. 9 FCC Rcd 1439.

<sup>21</sup> Id. at 1441.

<sup>22</sup> The CMRS requirement differs from the Section 3(27) definition by the use of the modifier "substantial", however the classes found to fail the test are still quite numerous.

"so specialized as to be of possible use to only a fraction of the total population."<sup>23</sup> ICN's services would be of use to the same list of users as the Commission identified for business radio. The issue is rather whether a common carrier can pick and choose which customers with a demand for its service will receive it, based not on availability or suitability, but upon the status of the potential user.

If the Commission nevertheless determines that ICN can be classified as a carrier, then the further question must be answered as to whether its picking and choosing of customers constitutes an unjust or unreasonable classification in violation of Section 202(a) of the Communications Act.<sup>24</sup> The essence of common carriage is non-discrimination, the essence of ICN's charter is a requirement that it refuse service to customers similarly situated to its authorized users.

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<sup>23</sup> Determination Letter at 2, citing *Nat. Ass'n of Regulatory Utility Comm'rs v. F.C.C.*, 52 F.2d 630, 641 (D.C. Cir. 1976).

<sup>24</sup> 47 U.S.C. 202(a).

### III. DESIGNATION OF ICN AS A COMMON CARRIER ELIGIBLE FOR DIRECT SUPPORT WOULD REDUCE COMPETITION FOR THE PROVISION OF SERVICE TO SCHOOLS AND LIBRARIES

The Commission may also consider public interest questions in determining whether it a given entity is, or should be required to be, a common carrier.<sup>25</sup> Although a potentially broad standard, the public interest includes at least consistency with the essential public policies of the Commission's rules. A central component of the Commission's plan for implementation of Section 254(h) is that for schools and libraries to qualify for the discounts, they must, with limited exceptions, conduct a competitive bidding process to obtain their supplier.<sup>26</sup> This requirement is a result of the general principle of competitive neutrality which the Commission adopted pursuant to Section 254(b)(7). The structure, functioning and financing of ICN indicate that it will have a substantial government granted advantage in any bidding process it enters for service to schools and libraries. Most of the schools and libraries are owned or controlled by political subdivisions of the state, which also owns and controls ICN. The statute begins with the statement that: "It is the intent of the general assembly that communications of state government be co-ordinated to effect maximum practical consolidation and joint use of communications services."<sup>27</sup> A school or library is thus under a strong suggestion that the legislature expects it to use the state network<sup>28</sup>

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<sup>25</sup> In *Norlight*, the Commission referred to a lack of market power as among the reasons that the activity would be considered private carriage. 2 FCC Rcd 134.

<sup>26</sup> *Universal Service Order*, para. 480, 47 C.F.R. § 54.504(a).

<sup>27</sup> Iowa Code Chapter 8D.1.

<sup>28</sup> Users are not, *per se* compelled to select the ICN at competitive bidding, if the charges are not competitive with the same services provided by another provider. Iowa Code Chapter 8D.9(2.a.(1)).

#### IV. CONCLUSION

The *Fourth Order on Reconsideration* rejected the claims of ITTC and others that their state networks were common carriers because it saw no "credible evidence that a state telecommunications network offers or plans to offer service indifferently to *any requesting party*." (emphasis added) ITTC has brought forth no arguments why the Commission should further reconsider that determination and no evidence that was not available before that order was adopted. The request should be denied.

Respectfully submitted

NATIONAL TELEPHONE COOPERATIVE  
ASSOCIATION

By: \_\_\_\_\_  
L. Marie Guillory

Its Attorney

2626 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037  
(202) 298-2359

David Cosson  
KRASKIN, LESSE & COSSON, LLP  
2120 L Street, N.W., Suite 320  
Washington, D.C. 20037  
(202) 296-8890